No. 88-731

Supreme Court, U.S.
FILED
JAN 17 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

WESTERN PENNSYLVANIA TEAMSTERS AND EMPLOYERS PENSION FUND; THOMAS L. FAGAN; W.F. HARDY (Deceased); JAMES H. HUTCHINSON, JR.; SAMUEL A. MONTANI (Deceased); CHARLES E. SALVATORE; JOSEPH E. ZAUCHA; RICHARD R. PELUSO; AND RAYMOND H. BAKER,

Petitioners,

—v.—

CARL COLTERYAHN DAIRY, INC.; PENSION BENEFIT GUARANTY CORPORATION; AMERICAN BENEFIT CORPORATION; MELVIN M. BROOKS, C.P.A.; FRANK STOKES, Individually and as Agent of AMERICAN BENEFIT CORPORATION; and LEON B. WILNEFF, Individually and as Agent of AMERICAN BENEFIT CORPORATION,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Of Counsel:

Henry M. Wick, Jr.
Charles J. Streiff
Vincent P. Szeligo
WICK, STREIFF, MEYER, METZ & O'BOYLE
1450 Two Chatham Center
Pittsburgh, PA 15219
(412) 765-1600

James B. Weidner
(Counsel of Record)
Stanley Godofsky
R. Scott Henderson
ROGERS & WELLS
200 Park Avenue
New York, New York 10166
(212) 878-8000
Attorneys for Petitioners Western Pennsylvania Teamsters and Employers Pension Fund, et al.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-731

WESTERN PENNSYLVANIA TEAMSTERS AND EMPLOYERS PENSION FUND; THOMAS L. FAGAN; W.F. HARDY (Deceased); JAMES H. HUTCHINSON, JR.; SAMUEL A. MONTANI (Deceased); CHARLES E. SALVATORE; JOSEPH E. ZAUCHA; RICHARD R. PELUSO; and RAYMOND H. BAKER,

Petitioners,

—v.—

CARL COLTERYAHN DAIRY, INC.; PENSION BENEFIT GUARANTY CORPORATION; AMERICAN BENEFIT CORPORATION; MELVIN M. BROOKS, C.P.A.; FRANK STOKES, Individually and as Agent of AMERICAN BENEFIT CORPORATION; and LEON B. WILNEFF, Individually and as Agent of AMERICAN BENEFIT CORPORATION,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Respondent's opposition confirms that certiorari should be granted.

1. Respondent misconstrues the Fund's petition as urging a position that would leave allegedly defrauded employers "without remedy." Opp. 7. Congress provided the remedy in MPPAA. Fund Pet. 7. The issue raised by this petition is whether the court below acted properly in creating a new federal common law remedy to fit the circumstances of *this* case because of its concern that these circumstances may not fit the

remedy Congress has statutorily provided.[1] As Respondent agrees, the court's decision in this respect was based solely upon the court's view of equitable principles. Opp. 6, 7. Having thus exceeded what Congress enacted, the court below violated what this Court has made clear: "[E]quitable considerations" are plainly "*not* a sufficient reason for enlarging on the remedial provisions contained in carefully considered statutes." *Northwest Airlines*, 451 U.S. at 98 (footnote omitted; emphasis supplied).

2. Respondent refers to the development of a "federal common law" of pension plans. Opp. 6-7. The reference is unavailing. The Court has directed that the judiciary is not to use notions of federal common law to "alter or supplement the remedies enacted," even in statutes Congress expected the courts to shape through decisions. *Texas Indus.*, 451 U.S. at 645. That admonition is particularly apt in this case, where recognition of remedies beyond those specifically provided in MPPAA would upset the "balancing of policies embodied in its choice of remedies." *Pilot Life Ins. Co.*, 107 S. Ct. at 1557. And, indeed, except for the decision below, *no* court has invoked federal common law to engraft new remedies onto those expressly enacted as part of MPPAA in 1980, nor does MPPAA's legislative history evidence a congressional intent that courts could do so. *See* Fund Pet. 8, 10.

3. Respondent contends the rationale of the decision below is "very narrow." Opp. 9. The opposite is true. As enacted, section 1451 limits claims to those arising from an "act or omission . . . *under this subtitle* [*i.e.*, MPPAA]." (52a). The decision below nevertheless signals that courts are free to fashion whatever federal common law claims they find appropriate in cases involving MPPAA, even in the face of the statutory remedy and procedure covering the same subject matter. Absent review, the decision will remain an open invitation for employer lawsuits seeking to override the express provisions of

---

1 Whether or not the Employer would succeed under the statute in this particular case turns on legal and factual issues not involved on this petition. *See* 13a-14a & n.11.

MPPAA, thereby renewing the uncertainty that Congress through MPPAA sought to avoid for pension plans and thousands of their beneficiaries throughout the country.

A writ of certiorari should issue to review the decision of the Court of Appeals.

Dated: January 13, 1989

Respectfully submitted,

James B. Weidner
(Counsel of Record)
Stanley Godofsky
R. Scott Henderson
ROGERS & WELLS
200 Park Avenue
New York, New York 10166
(212) 878-8000

Attorneys for Petitioners Western Pennsylvania Teamsters and Employers Pension Fund, et al.

Of Counsel:

Henry M. Wick, Jr.
Charles J. Streiff
Vincent P. Szeligo
WICK, STREIFF, MEYER, METZ & O'BOYLE
Two Chatham Center
Pittsburgh, PA 15219
(412) 765-1600